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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91237315
Party	Defendant Universal Life Church Monastery Storehouse, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AMERICAN MARRIAGE MINISTRIES, Opposer, v. UNIVERSAL LIFE CHURCH MONASTERY STOREHOUSE, Applicant.	Opposition No. 91237315 REPLY IN SUPPORT OF MOTION TO ORDER SERVICE OF TESTIMONY DEPOSITIONS, STRIKE OPPOSER'S NOTICE OF RELIANCE, AND EXTEND APPLICANT'S TRIAL PERIOD

I. INTRODUCTION

Although the parties have resolved several issues raised in Applicant's motion, Opposer has refused to cure many of the deficiencies raised therein. First, Opposer has failed to cite any law or evidence supporting its claim that Exhibits I-K to Opposer's Notice of Reliance are admissible. Accordingly, the Board should strike or disregard Exhibits I-K. Second, Applicant objected to the statements of relevance in Opposer's Notice of Reliance with ample time left for Opposer to cure, but Opposer simply chose not to do so. Accordingly, the Board should strike Opposer's Notice of Reliance. Third, although Opposer has now belatedly served copies of testimony depositions and exhibits, exhibits to the Dallas Goschie and Lewis King depositions are unlabeled. Accordingly, the Board should order Opposer to file and serve properly labeled copies of such exhibits. Fourth, although the parties have stipulated to extend Applicant's trial period, Opposer refuses to agree that Applicant should be allowed any period in which to submit evidence in direct response to any

supplemental submission from Opposer. Accordingly, if the Board grants Opposer the opportunity to make any supplemental submission, the Board should also allow Applicant a brief trial period in which to address any new issues raised by such a supplemental submission.

II. RELEVANT BACKGROUND

Applicant sets forth the following factual and procedural background herein to address **(A)** the allegations in Opposer's response brief, and **(B)** developments that have occurred since filing of Applicant's opening brief.

A. Applicant Raised Objections as Promptly as Possible

Pursuant to the parties' stipulation, Opposer's testimony period closed on September 11, 2020. 38 TTABVUE 2. The undersigned counsel was out of the office the following week, and had previously informed Opposer of that fact. The undersigned counsel is a solo practitioner, and his firm does not employ any other attorneys. In keeping with public health guidelines, the undersigned counsel has worked from his home during the 2020 COVID-19 pandemic. The undersigned counsel is also the father of two elementary-school students that attend Seattle Public Schools, and is married to a pre-school teacher. Declaration of Michael P. Matesky, II submitted herewith ("Matesky Reply Decl.") ¶¶ 4-7.

In September 2020, Seattle Public Schools began a robust, fully-online class schedule, which continues through the present. This schedule requires the same number of school hours as in the traditional, in-person format, but with students working exclusively from home. This, not surprisingly, has required a great deal of parental support, especially as students began this program in September and October. This, also not surprisingly, resulted in significant technical difficulties

on the part of students, teachers, and the school district. Such mishaps could not be fixed by elementary school students, but required regular adult intervention, as all parties attempted to figure out how to work successfully within the new online-only paradigm. At the same time, the undersigned counsel's wife began to conduct an online-school program from the same household, for a school that does not have any IT personnel. *Id.* ¶¶ 8-11.

Essentially, during September and the first part of October 2020, the undersigned counsel became the *ad hoc* educational coordinator and IT "professional" responsible for fixing regular technical difficulties faced by two elementary students and a teacher attempting to make online learning work from the same household in which the undersigned counsel was operating his solo law practice. This unexpected burden imposed by the COVID-19 pandemic, combined with the undersigned counsel's general workload as a solo practitioner and previously-scheduled week out of office immediately following submission of Opposer's Notice of Reliance, made it extremely difficult to address all of the failures of Opposer's evidentiary submissions in a speedy fashion. *Id.* ¶¶ 12-13.

This difficulty in speedily raising Opposer's evidentiary deficiencies was exacerbated by the variety and number of such deficiencies, and the fact that Opposer itself did not file or serve documents in a timely fashion. *Id.* ¶¶ 13-16; Matesky Decl. ¶¶ 9-11, 13, 46 TTABVUE 15-16. Opposer does not dispute that it failed to file multiple exhibits until after its testimony period closed on September 11th. Rather, Opposer filed several exhibits on September 25th—fourteen days after the close of its trial period. Opp. at 3-4, 56 TTABVUE 4-5; 44 TTABVUE 1-194; 45 TTABVUE 1. Despite learning by September 14th that it had not served Exhibit I on Applicant, Opposer did not get around to serving Exhibit I on Applicant until November 17th—after Applicant filed its motion.

Matesky Decl. ¶¶ 10-11, 46 TTABVUE 16; Matesky Reply Decl. ¶ 14. Opposer also does not dispute that it failed to serve copies of the Dylan Wall, Glenn Yoshioka, and Lewis King deposition transcripts, and exhibits thereto, until November 2, 2020. Opp. at 3, 56 TTABVUE 4; Matesky Reply Decl. ¶ 15. This was 28 days after Opposer's October 4, 2020 deadline to serve the Wall deposition, and 21 days after Opposer's October 11, 2020 deadline to serve the Yoshioka and King depositions. *See* Matesky Declaration ¶¶ 4, 6-7, 46 TTABVUE 15; 37 CFR § 2.125(b). Thus, rather than filing multiple piecemeal motions regarding Opposer's multiple and varied evidentiary deficiencies, Applicant filed a single motion addressing all such deficiencies on October 29, 2020. 46 TTABVUE 1-40; Matesky Reply Decl. ¶ 16.

B. <u>The Parties Have Narrowed the Scope of Dispute</u>

Applicant filed its motion in an attempt to avoid any further delay in resolving outstanding evidentiary issues, as it appeared unlikely the parties could resolve all outstanding issues by stipulation. Matesky Reply Decl. ¶ 16. However, Applicant informed Opposer immediately upon filing that it would like to discuss the issues raised in its motion, to see if any such issues could be resolved by stipulation and stricken from the motion. *Id.* ¶ 17. Although Opposer did not initially respond, the parties were eventually able to narrow the scope of dispute by stipulation. *Id.* ¶ 18.

Applicant agreed to withdraw the objections to Opposer's Notice of Reliance Exhibits B and C stated in Applicant's motion (without waiving other potential objections, such as hearsay). The parties also initially agreed to extend Applicant's trial period by 28-days, without prejudice to Applicant's pending request it be allowed some testimony period to submit evidence after Opposer submits any supplemental Notice of Reliance. *See id.*; 53 TTABVUE 2. The parties subsequently

stipulated that Applicant's testimony period would close on December 15, 2020, subject to the same terms. *See* 57 TTABVUE 2; Matesky Reply Decl. ¶ 18.

Opposer no longer relies on Exhibits U-Z to its notice of Reliance. Opp. at 8, 56 TTABVUE 9. Rather, OPPOSER has now filed and served deposition transcripts and exhibits for the Wall, Yoshioka, King, Freeman, Goschie, and Wozeniak depositions. 47-52, 54-55 TTABVUE. However, the exhibits to the Goshie deposition are not labeled. 54 TTABVUE 83-117. Similarly, only one of the three exhibits to the King deposition is labeled. *Compare* 55 TTABVUE 7, *with* 55 TTABVUE 132-35.

C. Four Disputed Issues Remain

Although the parties have resolved some issues, four disputed issues remain. First, the parties disagree regarding the inadmissibility of Exhibits I-K to Opposer's Notice of Reliance. Second, the parties disagree regarding the inadequacy of the statements of relevance in Opposer's Notice of Reliance. Third, Opposer has not filed or served labeled exhibits for the Goschie or King depositions. Fourth, the parties disagree whether Applicant should have any period to submit evidence in strict response to any supplemental or amended evidentiary submissions from Opposer.

III. ARGUMENT

A. Exhibits I-K to Opposer's Notice of Reliance are Inadmissible

The Board should strike or disregard Exhibits I-K to Opposer's Notice of Reliance because **(1)** briefs and declarations cannot be introduced via a Notice of Reliance, and **(2)** the declarations of Nancy Stephens and Dylan Wall are inadmissible due to Opposer's failure to disclose such testimony and the Board's prior ruling excluding such evidence. Opposer has filed to cite any law,

or any evidence, rebutting the arguments set forth in Applicant's motion regarding the inadmissibility of Exhibits I-K to Opposer's Notice of Reliance. Accordingly, the Board should strike or disregard Exhibits I-K.

1. Briefs and Declarations May Not be Admitted by Notice of Reliance

Exhibits I-K to Opposer's Notice of Reliance consist of Opposer's summary judgment briefs and the declarations of Nancy Stephens[1] and Dylan Wall (and exhibits thereto) filed in support of such briefs. *See* Not. of Reliance Ex. I, 41 TTABVUE 1; Not. of Reliance Ex. J, 43 TTABVUE 233-46; Not. of Reliance Ex. K, 43 TTABVUE 234-399. These are not documents that may be admitted into evidence via a Notice of Reliance. *See* 37 CFR §§ 2.120(k), 2.122(g); App. Mot. at 8-9, 46 TTABVUE 9-10. Opposer does not contest this in its opposition. First, with regard to its summary judgment briefs, Opposer concedes that they "are not evidence" and that it "does not intend to rely" on them. Opp. at 7, 56 TTABVUE 8. Second, Opposer cites no authority whatsoever suggesting that briefs or declarations may be entered into evidence via a Notice of Reliance. *See id. at* 7-8, 56 TTABVUE 8-9.

Rather, Opposer claims it submitted Exhibits I-K "per Trademark Rule 2.122(c)." *Id.* at 7, 56 TTABVUE 8. Yet, Rule 2.122(c) does not authorize introduction of briefs, declarations, or exhibits thereto via a Notice of Reliance. Rule 2.122(g) explicitly limits the types of documents admissible via a Notice of Reliance to those identified in "in paragraphs (d)(2) and (e)(1) and (2) of this section and § 2.120(k)." It does not permit admission of documents identified in paragraph

1 Applicant cannot cite to the specific pages comprising the Stephens declaration on TTABVUE because it was filed under seal. Applicant could not cite to the specific pages comprising the Stephens declaration in its opening motion because Opposer did not serve a copy of Exhibit I (as described in its Notice of Reliance and purportedly as filed with the Board under seal), until after Applicant filed its motion. Matesky Reply Decl. ¶ 14. However, the pages of Exhibit I (as belatedly served on Applicant) comprising the Stephens declaration and exhibits

2.122(c).[2] Thus, Opposer has failed to properly introduce exhibits I-K into evidence, and the Board should strike or disregard these exhibits.

2. Declarations of Nancy Stephens and Dylan Wall are Inadmissible for Lack of Disclosure and the Board's Previously-Identified Deficiencies

The Board should also strike or disregard the declarations of Dylan Wall and Nancy Stephens due to OPPOSER's failure to disclose such testimony and Board's prior order excluding such evidence. As argued in Applicant's motion, "Ms. Stephens was not identified as a witness in Opposer's pre-trial disclosures, and Opposer stated that Mr. Wall would be providing trial testimony by oral deposition, not by testimony declaration." App's Mot. at 9, 46 TTABVUE 10. Applicant also argued that "the Board has already stricken or disregarded much of the testimony and the exhibits attached to the Stephens and Wall declarations in its prior order denying Opposer's Motion for Partial Summary Judgment." *Id.* at 9-10, 46 TTABVUE 10-11. Opposer does not rebut either of these grounds for exclusion.

First, Opposer pretends as if the Nancy Stephens declaration does not exist, claiming that Exhibits I-K consist solely of Opposer's briefs and the Wall declaration. *See* Opp. at 7 (acknowledging only the Wall declaration, without mentioning the Stephens declaration); 56 TTABVUE 8. Second, Opposer claims that Applicant "fails to put forth argument as to why this evidence should be excluded." *Id.* As discussed in the preceding paragraph, a simple read of pages 9 and 10 of Applicant's motion shows this is not true. *See* 46 TTABVUE 10-11. Opposer does not

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thereto are Bates labeled as AMM NOR 1083 – 1170.

2 Rule 2.122(c) states "[e]xcept as provided in paragraph (d)(1) of this section, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony." Thus, it is possible that Opposer might have introduced Exhibits I-K via one of the testimony depositions it conducted, but not by a Notice of Reliance.

claim that it did adequately disclose the Wall and Stephens declaration testimony in its pretrial disclosures, nor does it argue that it is allowed to introduce such undisclosed witness testimony. *See* Opp. at 7-8; 56 TTABVUE 8-9. Opposer has simply failed to provide any rationale or justification for its failure to adequately disclose the declaration testimony from Ms. Stephens and Mr. Wall that Opposer submitted at the close of its testimony period.

Moreover, with regard to the portions of the Stephens and Wall declarations that the Board has already held to be inadmissible, Opposer now claims that the Board should "reconsider" such evidence, Opp. at 7, and that "Opposer cured a number of Applicant's previous evidentiary objections through the testimony elicited at the recent deposition," Opp. at 8 n.2, 56 TTABVUE 9. Yet, Opposer does not cite any Board rule or legal authority justifying a motion reconsideration (which Opposer has not field). *Id.* Similarly, although it claims that it has now "cured" the evidentiary deficiencies that the led the Board to exclude such evidence, it does not cite any law or evidence in support of that claim. *Id.*

Opposer argues that, because Applicant did not re-type all the arguments previously submitted to and decided by the Board regarding the inadmissibility of this evidence, Opposer had no "opportunity" to show that it has cured these previously-adjudicated deficiencies. *Id.* This is a hard argument to swallow. The Board's rationale for excluding such evidence was clearly laid out in its order denying Opposer's summary judgment motion. 36 TTABVUE 6-7. If Opposer truly had "cured" the deficiencies identified by the Board, it could have supported that claim with citations to law and evidence. It did not do so.

Thus, because Opposer utterly fails to respond to the evidentiary deficiencies laid out in Applicant's motion, the Board should strike or disregard the Stephens and Wall declarations contained in Exhibits I-K.

B. The Board Should Strike OPPOSER's Notice of Reliance

The Board should strike Opposer's Notice of Reliance because Opposer fails to adequately identify the relevance of materials submitted therewith to disputed issues and claims in this proceeding, and Opposer is not prejudiced by any alleged delay in raising objections. Opposer argues that Applicant has waived this objection by failing to timely raise it, relying on *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 U.S.P.Q.2d 1844 (T.T.A.B. 2017). However, *Apollo* is distinguishable from this case in numerous respects. First, the applicant in *Apollo* waited to file its evidentiary objection simultaneously with its brief on the case, after all testimony periods were closed. *See* Applicant's Separate Statement of Evidentiary Objections, Opp. No. 91219435 at *4, 14 TTABVUE 6; *see also* Trial Brief of Applicant Medical Extrusion Technologies, Inc., Opp. No. 91219435, 16 TTABVUE 1-16 (filed the same day). In contrast, Applicant raised its objection on October 29th—before the original close of its testimony period, forty-seven days before the stipulated December 15th close of its testimony period, and long before submission of any briefs on the case. *See* 46 TTABVUE 6-8 (Applicant's motion filed October 29th); 53 TTABVUE 2 (November 9th stipulation extending trial period to December 7th); 57 TTABVUE 2 (December 4th stipulation extending trial period to December 15th).

Moreover, *Apollo* and the sources cited therein hold only that a party "risks" waiving an objection to the statements of relevance in a notice of reliance if it raises the objection after its testimony period starts. 123 U.S.P.Q.2d at 1846-47. Such waiver is not automatic, and a finding of

waiver is not warranted in this case. First, as stated above, Applicant's inability to raise this objection before start of its testimony period was due to extraordinary circumstances presented by the COVID-19 pandemic, the multiple and varied deficiencies in the evidence presented by Opposer, and a desire to raise all such deficiencies in an efficient single motion—not lack of diligence or any attempt to spring an objection on Opposer after it could no longer cure the deficiency. *Supra* Section II(A).

Second, the rationale of *Apollo* is that defects in a party's statements of relevance are curable, and it would be inequitable to allow an objection to be raised simultaneously with a brief on the case, when there is no longer any opportunity to cure the deficiency. *See* 123 U.S.P.Q.2d at 1846-47. Yet, given the circumstances, Applicant raised this objection with ample time left for Opposer to cure its defect; Opposer has simply chosen not to do so. The parties first stipulated that Applicant's testimony period would terminate on December 7th (based on Opposer's admitted failure to serve deposition transcripts), then stipulated that it would end on December 15th (in order to accommodate both parties' schedules). Matesky Reply Decl. ¶¶ 18-19; 53 TTABVUE 2; 57 TTABVUE 2. This means that Applicant raised its objection to the statements of relevance in Opposer's Notice of Reliance forty-seven days before the close of Applicant's testimony period. Opposer could have easily cured its defective Notice of Reliance without affecting the parties' schedule at all. It has simply chosen not to do so.

Thus, because Opposer's Notice of Reliance fails to adequately identify the relevance of the evidence submitted therewith, and because Opposer has refused to cure this deficiency despite ample time to do so, the Board should strike Opposer's Notice of Reliance.

C. Opposer Has Not Filed or Served Properly Labelled Exhibits

The Board should order Opposer to file and serve on Applicant copies of the transcripts and exhibits from the Goschie and King depositions that comply with Board rules. A party that conducts a testimony deposition must file such deposition with the Board. 37 CFR § 2.123(h). In doing so, the exhibits "must be numbered or lettered consecutively and each must be marked with the number and title of the case and the name of the party offering the exhibit." 37 CFR § 2.123(g)(2). The exhibits to the Goschie deposition are not marked at all. *See* 54 TTABVUE 83-117. Only one exhibit to the King deposition (Exhibit 47) is marked. There are no labels distinguishing Exhibits 48 or 49 from Exhibit 47. *Compare* 55 TTABVUE 7, *with* 55 TTABVUE 132-35. Accordingly, although OPPOSER has belatedly served (and filed) deposition transcripts, the Board should order OPPOSER to file and serve properly marked exhibits for such transcripts.

D. The Board Should Allow Applicant to Submit Evidence in Strict Response to any Amended or Supplemental Notice of Reliance

Because Opposer has refused to cure the deficiencies in its Notice of Reliance despite ample time to do so, it does not require leave to file any supplemental notice or evidentiary submission. However, if the Board were to allow Opposer to submit any supplemental Notice of Reliance, it should allow Applicant a supplemental testimony period to submit evidence strictly responding to any new issues raised by such supplemental submission. Opposer argues that Applicant's request for a 60-day extension of its trial period following a Board order on Applicant's motion is excessive, because Opposer served deposition transcripts between 21 and 28 days late. Opp. at 9-10; 56 TTABVUE 10-11. However, when Applicant proposed a lesser extension, Opposer refused to agree to any additional evidentiary period to address new issues raised by any supplemental submission

from Opposer. Matesky Reply Decl. ¶ 19. It appears that Opposer's true aim to prevent Applicant from rebutting any new issues raised by a supplemental submission. To the extent the Board authorizes any supplemental submission from Opposer, Applicant requests that it be allowed some period to submit evidence in strict response to new issues raised by such supplemental submission.

IV. CONCLUSION

For the reasons set forth above, Applicant requests that the Board **(1)** strike or disregard Exhibits I-K to OPPOSER's Notice of Reliance, **(2)** strike Opposer's Notice of Reliance, **(3)** order Opposer to file and serve properly labeled exhibits to the Goschie and King depositions, and **(4)** in the event the Board allows any amended or supplemental submission from Opposer, allow Applicant a supplemental testimony period to submit evidence in strict response to any new issues raised by such supplemental submission.

DATED: December 8, 2020

Respectfully submitted:

MATESKY LAW^{PLLC}

s/ Michael P. Matesky, II/

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AMERICAN MARRIAGE MINISTRIES, Opposer, v. UNIVERSAL LIFE CHURCH MONASTERY STOREHOUSE, Applicant.	Opposition No. 91237315 REPLY DECLARATION OF MICHAEL P. MATESKY, II

I, Michael P. Matesky, II, declare as follows:

1. I am and at all relevant times have been counsel for Applicant in this matter.

2. I am over the age of eighteen years and otherwise competent to testify in this matter.

3. I make this declaration based on my personal knowledge.

4. I am the sole member and sole attorney employed by Matesky Law PLLC.

5. I was out of town and out of the office during the week immediately following the September 11th close of Opposer's trial period in this case. I had previously informed Opposer's counsel of that fact.

6. In keeping with public health guidelines, I have worked almost exclusively from my residence during the COVID-19 pandemic.

7. I am the father of two elementary school students who attend Seattle Public Schools. My wife is a pre-school teacher. All four of us reside in the same household from which I have conducted my solo law practice during the COVID-19 pandemic.

8. In September 2020, Seattle Public Schools began a robust, fully-online class schedule, which continues through the present. This schedule requires the same number of school hours as in the traditional, in-person format, but with students working exclusively from home.

9. This schedule has required a great deal of parental support, especially as students began this program in September and October.

10. My children, their teachers, and Seattle Public Schools experienced significant technical and logistical difficulties in trying to make this online learning curriculum work, especially during September and October. My children could not fix these issues without my regular intervention.

11. In September, my wife also began to conduct an online-school program for her pre-school. Her school does not have any IT personnel.

12. During September and the first part of October 2020, I was primarily responsible for addressing and fixing numerous technical difficulties faced both by my children and my wife's school as they attempted to make online learning work. I also was required to spend a significant amount of time coordinating my children's adaptation to their new schedules and online school program.

13. This unexpected burden, combined with the my general workload as a solo practitioner and previously-scheduled week out of office immediately following the close of

Opposer's trial period, made it extremely difficult to address all of the failures of Opposer's evidentiary submissions in a speedy fashion.

14. Opposer did not serve a copy of Exhibit I to its Notice of Reliance (as described in its Notice of Reliance and as purportedly filed under seal with the Board), until November 17, 2020.

15. Opposer did not serve copies of transcripts or exhibits for the Dylan Wall, Glenn Yoshioka, or Lewis King testimony depositions until November 2, 2020.

16. Faced with multiple evidentiary deficiencies, including (a) inadequate statements of relevance in Opposer's Notice of Reliance, (b) inadmissible exhibits to Opposer's Notice of Reliance, (c) late service of testimony deposition transcripts, (d) late filing of exhibits to Opposer's Notice of Reliance, (e) service of documents that did not accurately reflect exhibits attached to Opposer's Notice of Reliance, I did not believe Applicant and Opposer would resolve all such issues by stipulation. I also believed it was most efficient to file a single motion addressing all potentially-curable evidentiary deficiencies, rather than filing multiple piecemeal motions.

17. On October 29, 2020, immediately upon filing and serving Applicant's Motion to Order Service of Testimony Depositions, Strike Opposer's Notice of Reliance, and Extend Applicant's Trial Period, I emailed opposing counsel and asked them to let me know if they were available the next day or the following week to discuss whether any of the issues addressed in the motion could be resolved by stipulation." I followed up this request by emails sent on November 2nd and November 4th.

18. Eventually, the parties stipulated to a 28-day extension of Applicant's trial period to December 7th (without prejudice to Applicant's request that it be able to respond to any supplemental submission from Opposer), and Applicant' agreed with withdraw its stated objections

to Exhibits B and C to Opposer's Notice of Reliance (without prejudice to other potential objections, such as hearsay). In order to accommodate both parties' schedules, the parties subsequently stipulated that Applicant's trial period would close on December 15th.

19. On December 3, 2020, I emailed opposing counsel and asked whether Opposer would be "willing to agree to any proposal whereby ULC Monastery has an additional testimony period after the Board rules on ULC Monastery's Motion to Strike, if such additional/extended period is only for submission of evidence/testimony specifically addressing issues resolved by the Board's ruling (and/or addressing any amended submission from AMM in response to the Board's ruling)?" Opposer would not agree to any such proposal.

DATED: December 8, 2020 at Seattle, Washington

s/ Michael P. Matesky, II/
Michael P. Matesky, II

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on Opposer's counsel of record by email transmission to nancy.stephens@foster.com, pursuant to Trademark Rule § 2.119(b), 37 C.F.R. § 2.119(b).

Dated: December 8, 2020

s/ Michael P. Matesky, II
Michael P. Matesky, II